Supreme Court, U. S.
FILED
MAR 7 1977
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

1976-77 TERM

No. 76-1239

MICHAEL WILLIAM SCHULTZ,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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UNITED STATES OF AMERICA,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioner, Michael William Schultz, respectfully prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on February 8, 1977. A copy of such order is appended hereto at pages 1a and 2a.

STATEMENT OF JURISDICTION

(1) Petitioner respectfully seeks a review of the Order of the United States Court of Appeals for the Sixth Circuit entered on February 8, 1977 affirming the judgment of conviction of the United States District Court for the Southern District of Ohio.

(2) There was no rehearing held in the United States Court of Appeals for the Sixth Circuit, and no extension of time within which to petition for certiorari has been made.

(3) This Court's jurisdiction is conferred by 28 U.S.C. Section 1254 (1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether Rule 41 (H) of the Federal Rules of Criminal Procedure, which defines "daytime" as "the hours from 6:00 A.M. to 10:00 P.M., according to local time," constitutes an unconstitutional irrebuttable presumption contrary to fact, and whether the admission into evidence of items seized pursuant to a "daytime" search warrant which were, in fact, seized after dark and at nighttime deprived Petitioner of due process of law.

2. Whether the Trial Court's refusal before imposing sentence to provide Petitioner and his attorney, upon request, with a copy of the Presentence Investigation Report for examination, or to summarize orally or in writing the contents of said report, violated Rule 32 (c) (3) (A) of the Federal Rules of Criminal Procedure and require a remand for resentencing with full opportunity for Petitioner and his attorney to rebut erroneous statements and conclusions contained in the Presentence Investigation Report.

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. Fifth Amendment of the U.S. Constitution:

   "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. Const. Amend. V.

2. Fourth Amendment of the U.S. Constitution:

   "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. Amend. IV.

3. Rule 41 (c) of the Federal Rules of Criminal Procedures:

   "A warrant shall issue only on an affidavit or affidavits sworn to before the federal magistrate or state judge and establishing the grounds for issuing the warrant. If the federal magistrate or state judge is satisfied that grounds for the application exist or that there is probable cause to believe that they exist he shall issue a warrant identifying the property and naming or describing the person or

place to be searched. The finding of probable cause may be based upon hearsay evidence in whole or in part. Before ruling on a request for a warrant the federal magistrate or state judge may require the affiant to appear personally and may examine under oath the affiant and any witnesses he may produce, provided that such proceeding shall be taken down by a court reporter or recording equipment and made part of the affidavit. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall command the officer to search, within a specified period of time not to exceed 10 days, the person or place named for the property specified. The warrant shall be served in the daytime, unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime. It shall designate a federal magistrate to whom it shall be returned."

4. Rule 41 (h) of the Federal Rules of Criminal Procedure:

"This rule does not modify any act, inconsistent with it, regulating search, seizure and the issuance and execution of search warrants in circumstances for which special provision is made. The term 'property' is used in this rule to include documents, books, papers and any other tangible objects. The term 'daytime' is used in this rule to mean the hours from 6:00 a.m. to 10:00 p.m. according to local time. The phrase 'federal law enforcement officer' is used in this rule to mean any government agent, other than an attorney for the government as defined in Rule 54 (c), who is engaged in the enforcement of the criminal laws and is within any category of officers authorized by the Attorney General to request the issuance of a search warrant."

5. Rule 32 (c) (3) (A) of the Federal Rules of Criminal Procedure:

"Before imposing sentence the court shall upon request permit the defendant, or his counsel if he is so represented, to read the report of the presentence investigation exclusive of any recommendation as to sentence, but not to the extent that in the opinion of the court the report contains diagnostic opinion which might seriously disrupt a program of rehabilitation, sources of information obtained upon a promise of confidentiality, or any other information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons; and the court shall afford the defendant or his counsel an opportunity to comment thereon and, at the discretion of the court, to introduce testimony or other information relating to any alleged factual inaccuracy contained in the presentence report."

STATEMENT OF THE CASE

A. PROCEDURAL POSTURE.

Petitioner respectfully petitions for a review of the Order of the United States Court of Appeals for the Sixth Circuit entered on February 8, 1977, which Order affirmed the judgment and conviction of the United States District Court of the Southern District of Ohio, finding Petitioner guilty of the offense of conspiracy to distribute Cocaine and imposing a sentence of eight years in the federal penitentiary. The basis for federal jurisdiction in the court of first instance, the U.S. District Court for the Southern District of Ohio, is Title 21, U.S.C. Section 841 (a) (1) (3).

Petitioner was indicted for the offense of conspiracy to distribute Cocaine on January 6, 1976. Petitioner filed

a Motion to Suppress Certain Evidence and following the denial of this Motion by the Trial Court, Petitioner proceeded to trial on a plea of not guilty. Following a jury verdict of guilty filed on May 4, 1976, Petitioner was sentenced by the trial court to eight years in jail and three years probation on June 21, 1976, despite the fact he had no prior criminal record. Petitioner timely filed his Notice of Appeal with the U.S. Court of Appeals for the Sixth Circuit on June 21, 1976.

B. FACTS RELATING TO THE ISSUANCE AND EXECUTION OF THE SEARCH WARRANT.

At approximately 5:25 p.m. on December 11, 1975, Special Agent Hensel obtained a search warrant for the premises located at 6700 Johnson Road. The search warrant which was issued specified that the search was to be made in the "daytime" and Agent Hensel testified that he made no mention in his Affidavit of any circumstances or exigencies which would require a search at nighttime. Hensel testified that he telephoned Agent Powell and told him to "secure" the premises prior to commencement of the search. Powell testified that he arrived at the premises at approximately 6:30 p.m. Powell further testified that "it was dark at the time I arrived at the residence." Powell did not have the search warrant in his possession when he arrived at the premises.

Agent Hensel further testified that he arrived at the premises with the search warrant at approximately 7:15 p.m., and that the search commenced upon his arrival. Hensel stated that when he arrived at the residence, it was dark out.

At trial, Agents Hensel and Powell reiterated their previous testimony as to the respective times when they arrived

at the premises, the time when the search commenced, and the fact that it was "dark" out when they arrived at the residence.

C. FACTS RELATING TO THE PRESENTENCE INVESTIGATION REPORT AND SENTENCING.

Following the Petitioner's conviction, a Presentence Investigation Report was prepared by Mr. Steve Smith of the Probation Department. This report was available to the Court at the time Petitioner was sentenced.

Prior to sentencing, Petitioner's counsel requested from the Court a copy of the Presentence Investigation Report for examination. This request was made orally in chambers and denied by the Court. The Court advised counsel that the Report could be seen after sentence was imposed. The Court did not summarize the contents of the report for the Petitioner or for his attorney prior to sentencing. The Petitioner or his attorney did not have an opportunity to comment on the contents of the report or to introduce any testimony at sentencing to rebut any factual inaccuracies in the report. On June 21, 1976, Petitioner was sentenced to an eight-year prison terms, plus three years probation, by the Court. Several months after sentencing defense counsel examined the Presentence Investigation Report. An examination of that report disclosed the following, *inter alia*:

(1) The report mentioned that in the search of the premises at 6700 Johnson Road, the D.E.A. found quantities of marijuana in cold air ducts and in plastic baggies.

(2) The report mentioned that fire arms, including a stolen gun, were found in the search of the premises at 6700 Johnson Road.

(3) The report mentioned that Petitioner was charged with obstruction of justice.

(4) The report mentioned that Petitioner had admitted to smoking marijuana occasionally.

(5) Finally, the report mentioned that the D.E.A. claimed that Petitioner was a supplier of cocaine and other illegal drugs.

The above information contained in the Presentence Investigation Report was inaccurate, and Petitioner and his counsel were deprived of any opportunity to refute these unsubstantiated allegations because of the failure to provide them with an opportunity to examine the report. Its devastating impact was obvious. Petitioner had no prior criminal record. The two sales made in this alleged conspiracy were only to government agents, and the Petitioner was not directly involved in any sales. Despite this, he was given an eight year sentence and three months probation.

ARGUMENT FOR WRIT OF CERTIORARI

I. RULE 41(H) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE, WHICH DEFINES "DAYTIME" AS "THE HOURS FROM 6:00 A.M. TO 10:00 P.M., ACCORDING TO LOCAL TIME," CONSTITUTES AN UNCONSTITUTIONAL IRREBUTTABLE PRESUMPTION CONTRARY TO FACT, AND THE ADMISSION INTO EVIDENCE OF ITEMS SEIZED PURSUANT TO A "DAYTIME" SEARCH WARRANT WHICH WERE, IN FACT, SEIZED AFTER DARK AND AT NIGHTTIME DEPRIVED PETITIONER OF DUE PROCESS OF LAW.

In the process of giving content and meaning to the Fourth Amendment, courts and legislatures have, either by judicial decision or statute, recognized the necessity for distinguishing between daytime and nighttime searches. Since the search at night has traditionally been associated with the totalitarian government, courts have traditionally required a stricter standard of proof to justify the issuance of a nighttime search warrant. Rule 41 (c) of the Federal Rules of Criminal Procedure embodies the traditional mistrust of nighttime searches and restricts nighttime warrants to situations where the affidavits upon which they are issued are based on an additional showing of "reasonable cause" for a nighttime search.

In *Jones* v. *United States,* 357 U.S. 493 (1958), this Court expressed the view that the nighttime search constituted a high probability for serious intrusion into highly protected constitutional rights. In that case, this court stated the following (375 U.S. 498) :

"It is difficult to imagine a more severe invasion of privacy than the nighttime intrusion into a private home that occurred in this instance."

And, courts in dealing with the propriety of the execution of search warrants have stated, in holding a daytime search warrant to have been properly executed in the daytime, that the identical search would have been improper if made at night. *United States* v. *Woodson,* 303 F.2d 49 (6th Cir., 1962), cert. den. 373 U.S. 941.

Prior to 1972, the question of whether a search warrant had been executed in the "daytime" or "nighttime" was resolved by courts on the basis of a factual determination of all of the circumstances surrounding the execution of the warrant. One line of cases employed the socalled "sunrise-to-sunset" test holding that "nighttime" for the purpose of executing search warrants was that time between the setting and the rising of the sun — regardless of actual darkness. *United States* v. *Lepper,* 288 F. 136, aff'd. 295 F. 1017 (2nd Cir., 1923); *United States* v. *Martin,* 33 F.2d 639 (D.C. Mass., 1929). Another line of cases construed and interpreted the definition of "nighttime" for the purposes of the propriety of executing search warrants at night based upon a factual determination of darkness. These courts defined "daytime" as ". . . the time from the rising to the setting of the sun, and that portion of the time after the setting of the sun, or before its rising, during which there is sufficient natural light, other than moonlight, so that the countenance of a man may be distinguished." See Annotation "Propriety of Execution of Search Warrant at Nighttime," 26 ALR 3d 951, 975 (Sec. 9 and cases cited therein).

Under either test, resolution of what constitutes "daytime" and "nighttime" involved a factual determination by the courts.

However, the promulgation of Rule 41 (h) of the Federal Rules of Criminal procedure (effective October 1, 1972) eliminated the factual determination of daytime or nighttime, and purported to define the term "daytime" as ". . . the hours from 6:00 a.m. to 10:00 p.m. according to local time." The constitutional deficiencies of this definition are as follows:

1. It creates an irrebuttable presumption of a finding of "daytime" which is often contrary to fact; and

2. It permits the execution of "daytime" search warrants at a time when it is or may be, in fact, "nighttime" without requiring the attendant showing of "reasonable cause" as required by Rule 41 (c) of the Federal Rules of Criminal Procedure.

The Supreme Court has in the past considered a group of cases in which it was found that permanent classifications created by a rule or statute constituted irrebuttable presumptions, and this court has held that such an irrebuttable presumption violates the due process clause if the presumption ". . . is not necessarily or universally true in fact, and when the state has reasonable alternative means of making the crucial determination." *Vlandis* v. *Kline,* 412 U.S. 441 (1973).

For example, statutes presuming any gift made by a decedent within six years to be a part of a decedent's estate (*Schlesinger* v. *Wisconsin,* 270 U.S. 230 (1926)), that illegitimate fathers are unfit as parents in custody proceedings (*Stanley* v. *Illinois,* 405 U.S. 645 (1972)), that married students whose legal address was outside of the state at the time of their application to a state university were deemed non-residents and ineligible for reduced tuition (*Vlandis* v. *Kline,* 412 U.S. 441 (1973)), that pregnant teachers must take leaves of absence in the fifth or sixth month of preganacy (*Cleveland Board of Education* v.

LaFleur, 414 U.S. 632 (1974)), that non-dependents over the age of eighteen were ineligible for food stamp benefits (*U.S. Department of Agriculture* v. *Murry,* 413 U.S. 508 (1973)), and that unrelated individuals in participating households are ineligible for food stamp benefits (*U.S. Department of Agriculture* v. *Moreno,* 413 U.S. 528 (1973)) have all been found unconstitutional on the grounds that the irrebuttable presumptions which those statutes created were not universally true and, thus, violative of the due process clause.

It is no answer to contend that Rule 41 (h) differs from the above line of cases on the grounds that it simply defines "daytime." None of these statutes involved above used the terminology or form of a legal presumption. They all represented situations where the legislature made irreversible classifications which were inconsistent with fact, or not universally true, and barred an individual from a hearing to show that his particular situation actually fit within the classification. The definition of "daytime" in Rule 41 (H) involves precisely the same irreversible determination and had the same consequences insofar as it precluded Petitioner from showing that the search and seizure in this case occurred at "nighttime" without express authorization therefor in the warrant.

Moreover, the Supreme Court has recognized in another line of cases that the creation of presumptions raises special problems of adhering to strict standards of fairness in the criminal process and the court has employed rigorous standards in evaluating the constitutionality of rebuttable presumptions in criminal statutes. *Turner* v. *United States,* 396 U.S. 398 (1970); *Leary* v. *United States,* 395 U.S. 6 (1969); *United States* v. *Romano,* 382 U.S. 36 (1965); *Tot* v. *United States,* 319 U.S. 463 (1943).

The court has employed a similar rigorous scrutiny of statutes creating irrebuttable presumptions which affect

highly-favored constitutional rights, such as the right to vote. *Carrington* v. *Rash,* 380 U.S. 89 (1965).

In *Carrington* v. *Rash, supra.,* this court struck down a provision of the Texas constitution which denied United States servicemen resident status in determining their eligibility to vote. Only servicemen who resided in Texas at the time they entered the service were granted the franchise. After finding that the statute created an irrebuttable presumption that servicemen not originally from Texas were not bona fide residents, this court held that the discrimination created by the presumption was particularly invidious because the individual interest involved was ". . . close to the core of our constitutional system." (Id. at 96-97).

Traditionally, classifications made in the hypersensitive areas, such as search and seizure, have been deemed "suspect" or "fundamental" and have been subjected to a strict judicial scrutiny under the "two-tier equal protection" concept. See generally "Developments in the Law — Equal Protection" 82 *Harvard Law Review* 1065 (1969). The classification made by Rule 41 (h) is such a classification and will not withstand exacting judicial scrutiny in this case.

In the instant case, the irrebuttable presumption created by Rule 41 (h) of the Federal Rules of Criminal Procedure involves both the interests of defendants in the criminal justice system, and the rights secured to citizens by the Fourth Amendment to the United States Constitution. For those reasons, the definition of "daytime" and the presumption that that definition creates insofar as the execution of search warrants is concerned must be rigorously scrutinized.

The irrebuttable presumption created by virtue of Rule 41 (h) of the Federal Rules of Criminal Procedure may be stated syllogistically as follows:

> "From proof of the basic facts established (execution of the search warrant between the hours of 6:00 a.m. and 10:00 p.m.), the presumed fact which is required to be found as a universal truth is that that time period is 'daytime.'"

Both commonly-accepted definitions of "daytime" and the testimony in the instant case demonstrates the fallacy of the presumption created by Rule 41 (h) of the Federal Rules of Criminal Procedure, and establishes that Rule 41 (H's) definition of daytime as lasting until 10:00 p.m. on December 11, 1975 was flagrantly inconsistent with the facts.

In the Oxford University Dictionary (revised edition 1955), "day" is defined as follows:

> "The time between the rising and setting of the sun; the interval of light between one night and the next; in ordinary usage including the lighter part of morning and evening twilight."

Obviously, depending upon the season of the year and the place involved, "day" ends well before 10:00 p.m., the time limit established by Rule 41 (h) of the Federal Rules of Criminal Procedure.

Moreover, Agents Powell and Hensel both testified at trial that, at the time they arrived at the premises at 6700 Johnson Road (6:30 p.m. and 7:15 p.m., respectively), that it was "dark" outside.

Thus, the uncontroverted testimony at trial was that a search warrant which authorized only a "daytime" search had, in fact, been executed after dark and at nighttime. The evidence seized pursuant to this search was admitted at trial only because of the presumption created by Rule 41 (h) that the search had occurred in the "daytime." This rule and the presumption precluded the court from

considering uncontroverted testimony at trial that the warrant had been executed at "dark."

Rule 41 (h) has chosen a classification which is based upon a day-night dichotomy in the hypersensitive area of Search and Seizure. This hypersensitive area is protected by the Bill of Rights.

> "The security of one's privacy against arbitrary intrusion by the police – which is at the core of the Fourth Amendment – is basic to a free society. It is therefore implicit in 'the concept of orderly liberty' . . . The knock at the door, whether by day or by night, as a prelude to a search, without authority of law but solely on the authority of the police did not need the commentary of recent history to be condemned as inconsistent with the concepts of human rights when enshrined in the history and the basic constitutional documents of English-speaking peoples." *Wolf* v. *Colorado*, 338 U.S. 25, 27-8 (1949).

In our Constitutional hierarchy of values, there may be other rights which are just as highly protected and cherished as those preserved by the Fourth Amendment. But there is *none* that is more highly cherished, protected and valued than the Fourth Amendment rights. Our legislatures cannot convert nighttime into daytime by legislative fiat. That is arbitrary and capricious in any area of the law. What is even clearer is that that kind of classification is flagrantly impermissible in the area of Search and Seizure. The Supreme Court's irrebuttable presumption doctrine requries a finding that the search in this case was a violation of the due process rights of Petitioner.

II. THE TRIAL COURT'S REFUSAL BEFORE IMPOSING SENTENCE TO PROVIDE PETITIONER AND HIS ATTORNEY, UPON REQUEST, WITH A COPY OF THE PRESENTENCE INVESTIGATION REPORT FOR EXAMINATION, OR TO SUMMARIZE ORALLY OR IN WRITING THE CONTENTS OF SAID REPORT, VIOLATED RULE 32(c)(3)(A) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE AND VITIATE THE SENTENCING IN THE INSTANT CASE.

Effective December 1, 1975, Rule 32 of the Federal Rules of Criminal Procedure was amended as regards the disclosure requirements of presentence investigation reports. As amended, Rule 32 (c) (3) provides as follows:

> "(A) Before imposing sentence, the court *shall* upon request permit the defendant, or his counsel if he is so represented, to read the report of the presentence investigation exclusive of any recommendation as to sentence, but not to the extent that in the opinion of the court the report contains diagnostic opinions which might seriously disrupt a program of rehabilitation, sources of information obtained upon a promise of confidentiality, or any other information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons; and the court *shall afford the defendant or his counsel* an opportunity to comment thereon and, at the discretion of the court, to introduce testimony or other information relating to any alleged factual inaccuracies contained in the presentence report.
>
> (B) If the court is of the view that there is information in the presentence report which should not be disclosed under subdivision (c) (3) (A) of this Rule, the court in lieu of making the report or part thereof

> available *shall state orally or in writing a summary of the factual information contained therein to be relied on in determining sentence, and shall give the defendant or his counsel an opportunity to comment thereon.* The statement may be made to the parties in camera." (Emphasis added.)

The rationale for the foregoing amendment was explained as follows in Notes of Committee on the Judiciary, House Report No. 94-247:

> "Upon the defendant's request, the court must permit the defendant to read the presentence report, except for the recommendation as to sentence . . . The Court must give the defendant an opportunity to comment upon the presentence report. If the court decides that the Defendant should not see the report, then it must provide the defendant orally or in writing, a summary of the factual information in the report upon which it is relying in determining sentence . . . .
>
> Since the presentence report is to be used by the court in imposing sentence and since the consequence of any significant inaccuracy can be very serious to the defendant, the Committee believes that it is essential that the presentence report be completely accurate in every material respect."

In the instant case, the court neither permitted the defendant nor his attorney to examine the report, nor summarized the contents of the report. As a result, the Petitioner had no opportuninty to either comment on the contents of the report or to introduce any testimony to rebut factual inaccuracies contained therein.

The failure of the court to comply with the mandatory provisions of Rule 32 (c) (3) of the Federal Rules of Criminal Procedure vitiates the sentence imposed by the court in the instant case. The non-compliance with Rule 32 (c) (3) was prejudicial as well. The material contained in

the report had allegations of the commission of other crimes such as (1) possession of marijuana, (2) use of marijuana, (3) possession of a stolen fire arm, (4) a charge of obstruction of justice and (5) a bald conclusory allegation by the D.E.A. that the defendant was a supplier of cocaine and other illegal drugs. Simple concepts of due process sentencing required that this would have to be known by the Petitioner and his counsel, and that an opportunity should have been given to rebut these accusations. Petitioner stands ready to deny practically all of these allegations and to produce evidence as to the incorrectness of these allegations. The allegations here, unresponded to, would have an enormous impact upon any sentencing judge.

Simple justice requires that the sentence be set aside in this matter, because of a failure to comply with the letter, spirit and intent of Rule 32 (c) (3). As a result, the sentence imposed was invalid in this case and prejudicial error was committed.

CONCLUSION

The above argument establishes that this court must allow this Petition for Writ of Certiorari under Supreme Court Rule 19 (1) (b) because:

A. As to the search and seizure question, the Court of Appeals decided this important question of the validity of Rule 41 (h) FRCrP, which has not been but should be settled by this Court. Further, the Court of Appeals' decision as to the reasonableness of Rule 41 (h) FRCrP was in patent and flagrant conflict with the rationale of the applicable decisions of this Court on irrebuttable presumptions. That line of authority mandates a finding that Rule 41 (h), as applied to the facts of this case, is unconstitutional.

B. As to the Presentence Report question, the failure of the Court of Appeals to remand this case back to the District Court represented so far a departure from the accepted and usual course of judicial proceedings, (and sanctioned the same by the Trial Court) by the total disregard of the requirements of Rule 32 (c) (3) FRCrP as to require an exercise of this Court's power of supervision. Further, this is an important question of federal law, which has not been, but should be settled by this Court.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

CR-2-76-2

UNITED STATES OF AMERICA,
Plaintiff,

vs.

GARY WHITEHEAD, RICHARD DAVID COFFEY,
MICHAEL WILLIAM SCHULTZ,
Defendants.

JUDGMENT AND PROBATION/COMMITMENT ORDER

(Filed June 21, 1976)

In the presence of the attorney for the government, the defendant appeared in person on this date June 21, 1976.

With Counsel Arnold Morelli.

Plea – Not Guilty.

There being a verdict of Guilty –

Defendant has been convicted as charged of the offense(s) of conspiracy to distribute cocaine. In violation of Title 21 United States Code, Section 846. – Count #1.

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to

the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Eight (8) years on Count 1 of the Indictment, and in accordance with the requirements of Title 21 United States Code, Section 841 (b) (1) (a), there is imposed on this defendant a special parole term of Three (3) years in addition to and following the service of the term of imprisonment imposed on this defendant.

/s/ JOSEPH P. KINNEARY
U. S. District Judge

Date: June 21, 1976

NO. 76-2021

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

MICHAEL WILLIAM SCHULTZ,
Defendant-Appellant.

ORDER

(Filed February 8, 1977)

Before: EDWARDS and PECK, Circuit Judges, and CECIL, Senior Circuit Judge.

Defendant-appellant perfected this appeal from his judgment of conviction entered pursuant to jury verdict finding him guilty of conspiring to distribute cocaine in violation of 21 U.S.C. § 841 (a) (1), and from the order of imposition of sentence.

On appeal, appellant principally argues that the court erred in refusing to suppress and in subsequently receiving in evidence cocaine which was seized in the execution of a search warrant issued under standards established by Rule 41 (h), Federal Rules of Criminal Procedure, for the issuance of a warrant to be issued during the "daytime." For the purposes thereof, said Rule defines "daytime" as the period between 6 a.m. and 10 p.m., and appellant contends that this provision creates an unconstitutional irre-

buttable presumption because it is contrary to fact. Being fully advised in the premises, the Court concludes that the definition is reasonable and permissible and that it is not unreasonable to provide a lower standard for the invasion of privacy during said period than during the period from 10 p.m. to 6 a.m.* The Court having further concluded that no errors prejudicial to the rights of the defendant-appellant are reflected in the record on appeal,

IT IS ORDERED that the judgment of the district court be and it hereby is affirmed.

ENTERED BY ORDER
OF THE COURT

/s/ JOHN P. HEHMAN,
Clerk of Court.

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* This conclusion is not inconsistent with the implictions of *Gooding* v. *United States*, 416 U.S. 430, 454-460 (1973).

No. 76-1239

Supreme Court, U. S.
FILED
MAY 3 1977
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

MICHAEL WILLIAM SCHULTZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

LAWRENCE G. WALLACE,
Acting Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner contends that the definition of "daytime" in Rule 41(h) of the Federal Rules of Criminal Procedure creates an unconstitutional irrebuttable presumption and that the district court violated Rule 32(c)(3)(A), Fed. R. Crim. P., by refusing a defense request to read the pre-sentence investigation report before sentence was imposed.

After a jury trial in the United States District Court for the Southern District of Ohio, petitioner was convicted of conspiracy to distribute cocaine, in violation of 21 U.S.C. 846. He was sentenced to eight years' imprisonment, to be followed by a three-year special parole term (Pet. App. 1a-2a). The court of appeals affirmed (Pet. App. 3a-4a).

1. The evidence against petitioner was obtained as a result of a search of his farmhouse pursuant to a warrant

issued to Drug Enforcement Administration agents at 5:25 p.m. on December 11, 1975. The agents arrived at the farmhouse at 6:30 p.m. and commenced the search at 7:15 p.m., at which time it was dark. Petitioner contends (Pet. 9-15) that this search violated Rule 41(c) of the Federal Rules of Criminal Procedure because the warrant did not expressly authorize execution other than in the daytime.

As the court of appeals correctly noted (Pet. App. 3a), however, Rule 41(h), Fed. R. Crim. P., defines "daytime," for purposes of Rule 41(c), "to mean the hours from 6:00 a.m. to 10:00 p.m. according to local time." Thus, the search in this case took place in the "daytime," within the meaning of Rule 41. Petitioner's challenge to the definition in Rule 41(h) as an unconstitutional "irrebuttable presumption of a finding of 'daytime' which is often contrary to fact" (Pet. 11) incorrectly assumes that the Fourth Amendment requires that a search warrant expressly provide for nighttime execution. See *Gooding* v. *United States*, 416 U.S. 430. Although Rule 41 does impose such a requirement, it also limits its scope. The definition of "daytime" in Rule 41(h) is fully responsive to the considerations underlying the need for express authorization in Rule 41(c), since the greater expectation of privacy from governmental intrusion during the nighttime arises from the lateness of the hour rather than the absence of sunlight.

2. Petitioner contends (Pet. 16-18) that the district court violated Rule 32(c)(3)(A), Fed. R. Crim. P., by refusing to allow his counsel to read the presentence report before sentence was imposed. Rule 32(c)(3)(A) provides, however, that the court must permit the defendant or his counsel to view the presentence report only "upon request." See *United States* v. *Hodges*, 547 F. 2d 951, 952 (C.A. 5); *United States* v. *Cox*, 485 F. 2d 699, 700 (C.A. 5); *Gallo* v. *United States*, 461 F. 2d 1008 (C.A. 8); *United States* v. *Baker*, 429 F. 2d

1344, 1348 (C.A. 7). Nothing in the files or records of this case reflects a request by petitioner to see his presentence report prior to the imposition of sentence. Although petitioner asserts (Pet. 7) that his counsel, in chambers, orally requested to read the presentence report before sentencing, there is no reason to believe that the trial judge, who carefully followed all required procedures in pronouncing sentence (see Tr. 5-8),[1] would have denied that request in clear disregard of Rule 32(c)(3)(A).

Moreover, the transcript of petitioner's sentencing suggests that no such request was made. If, as petitioner now alleges, the district court had refused to allow his counsel to view the presentence report, in violation of Rule 32(c), counsel presumably would have attempted to make his request and the court's denial a matter of record prior to the imposition of sentence. Furthermore, if, as petitioner claims, the court had offered to permit inspection of the presentence report once sentence had been imposed, it is likely that defense counsel would have renewed his request immediately after sentencing. The sentencing transcript shows that petitioner's attorney took neither action.

In any event, in the absence of a complete record resolution of the factual question whether petitioner's counsel requested an opportunity to see the presentence report prior to sentencing is impossible at this stage of the proceedings. Petitioner's appropriate course is a motion to correct his sentence, pursuant to Rule 35, Fed. R. Crim. P., which would allow the district court to conduct an evidentiary hearing on petitioner's allegations, if appropriate, and, if necessary, to resentence petitioner.[2]

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[1] "Tr." refers to the transcript of petitioner's sentencing on June 21, 1976, a copy of which is being lodged with the Clerk of this Court.

[2] Petitioner's further contention (Pet. 7-8) that the district court relied in sentencing on material inaccuracies in the presentence

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

LAWRENCE G. WALLACE,
*Acting Solicitor General.**

MAY 1977.

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report, if correct, may also entitle him to relief under 28 U.S.C. 2255. See *Townsend* v. *Burke*, 334 U.S. 736. This claim also is not ripe for review on the present record.

*The Solicitor General is disqualified in this case.